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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1285

RICHARD SHEW,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

RAYMOND KYLE HAYES,
J. ALLIE HAYES,
Counsel for Petitioner.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Richard Shew, is seeking certiorari in this case to review a decision of the Circuit Court of Appeals for the Fourth Circuit affirming a judgment of the District Court for the Middle District of North Carolina, Wilkesboro Division. Said judgment having been affirmed by the United States Circuit Court of Appeals for the Fourth Circuit on the 3rd day of May, 1946, by Case No. 5460.

Petitioner is at present time on bond.

The respondent is the United States of America.

Statement

The petitioner contends that error was committed by the trial court and that the Circuit Court of Appeals committed error in affirming the action of the trial court, and that such errors deprived him of his constitutional rights as guaranteed to him under the 4th Amendment to the Constitution of the United States.

The petitioner was charged in an indictment of four counts with unlawfully, wilfully, knowingly and feloniously violating certain revenue laws relating to intoxicating liquors, to-wit, Title 26 U. S. C. A. Sections 2810, 2833 and 2803 respectively. Specifically the first count charged him with the possession of a still for the production of spirituous liquors without having first registered the same as required by law; the second count charged that he carried on the business of a distiller without having given bond as required by law; the third count charged that he carried on the business with intent to defraud the United States of the tax on the spirits distilled by him, and the fourth count charged the possession of two gallons of distilled spirits in one-half gallon jars which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing the payment of internal revenue taxes imposed thereon, as required by law.

On the 25th day of October, 1945, Agents for the Alcohol Tax Unit concealed themselves in the woods near the petitioner's home and saw the petitioner with two other men unloading wooden slabs from a truck in the edge of the yard. When the slabs were unloaded the truck was backed to a point near the smokehouse and seven 50 gallon wooden barrels were loaded on the truck. The truck was then pulled to a point near the edge of the yard in an old road where the truck stopped and the men engaged in working on the truck.

The officers came upon the scene and placed the petitioner in custody of the United States Marshal. This took place at a point near the wood pile or in an old road near the yard of the petitioner's home. The marshal kept the petitioner in custody while the agents for the Alcohol Tax Unit continued to search in and around the premises of the petitioner. In the course of their investigation they found what the officers testified to as a torn down still furnace (R. 8), approximately 59 steps from the yard of the petitioner. At the old torn down furnace the officer found what he testified to as approximately 100 gallons of spent mash and also the print in the ground of what appeared to be tracks of 50 gallon barrels (R. 8, 9). At the hog lot of the petitioner in the edge of the yard they found three 5 gallon cans of the same substance which he testified was spent mash. The agents asked permission of the petitioner to search his house and smokehouse, which request was denied by the petitioner (R. 12). The agents then went to the smokehouse, opened the door which was latched, proceeded to search, and on the second floor of the smokehouse they found two gallons of non-tax paid distilled spirits in one-half gallon glass jars, an automobile radiator which the officer testified was similar to those used as condensers in the illicit manufacture of distilled spirits (R. 14); a filter bag and syphon were also found (R. 14).

After the search the petitioner was brought before the United States Commissioner and required to give bond.

In the trial of the case the petitioner, in apt time, moved to suppress the evidence and quash the bill of indictment on the ground that the evidence acquired by this search violated the petitioner's rights as guaranteed to him under the 4th Amendment to the United States Constitution. The trial court overruled his motion. The third count in the indictment was not submitted to the jury because the court was

of the opinion that it was virtually a duplication of the second count. There was a general verdict of guilty and the petitioner was sentenced to a year and a day in the penitentiary, from which conviction and sentence the petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit.

The petitioner brings this petition for certiorari contending that the evidence secured by the search of the smokehouse was inadmissible because the search was unlawful and unreasonable and in violation of his rights as guaranteed to him under the 4th Amendment, in that the smokehouse was a part of the petitioner's home and premises. The officers had no warrant either to arrest the petitioner or to search his house or his effects.

There were certain statements made during the progress of the search as follows:

> "A. (By witness Felts) After searching around the premises for sometime and investigator Fretz searching around there, Deputy Marshal Bessant and I went back into the yard and talked to Richard Shew and Paul Edmiston and Sam Shatley, and Mr. Shew asked me, "Did you find the still?" I said, "No, I didn't find any still, who has been making that liquor up there, looks like he made a lot of liquor." He didn't give any direct answer, and then he said, "Did you find the still?" and I said, "No." He said, "Sure enough, did you find it?" and I said "No", and we went off, and the next time we didn't find it and come back and he said, "Did you find that still?" and I said, "No", and he said, "Sure enough, didn't you find it?" and I said "No", and then I asked permission to search the residence and outhouse, and he would not give it, and then he said, "These boys come here to haul me some slabs." He said, "I know I am caught, I am guilty."
>
> "Defendant objects.
>
> "Q. What did he say?

"A. He said, "I am caught," that time, but later before the Commissioner——

"Defendant objects.

"Q. What happened right there?

"A. Right there he said, "I am caught." He said, "These boys have not got anything to do with it."

"Defendant objects." (R. 11, 12).

That the officers approached the petitioner after searching around the premises, and during the progress of the search the statements above set out were sarcastically and melodramatically made by the petitioner to the officers as follows: "Did you find the still?" "Sure enough, did you find it?" To these statements the agents for the Alcohol Tax Unit sought to attach admission of guilt when by their import they clearly show they were made in a sarcastic manner and in showing the petitioner's disgust with the officers' high-handed method of search and seizure.

It is contended by the petitioner that he had not been warned of his constitutional rights or accused of any crime and that said conversations as set out show clearly that the officers were not arresting the petitioner for a crime committed in their presence, but were conducting an exploratory search in an effort to find evidence of crime on which to base an indictment.

The petitioner further contends that the trial court should have directed a verdict of not guilty and discharged the defendant because of the failure of the government to establish the *corpus delicti* by competent evidence and that the Circuit Court of Appeals was in error in affirming the judgment of the lower court on this ground.

Jurisdiction

Jurisdiction of this Court is invoked under Sections 237 (b) and 240 (a) of the Judicial Code as amended by the

Acts of February 13, 1925, in Title 28 U. S. C. A., Sections 344 (b) and 347 (a), also Act of March 8, 1934.

Questions Presented

1. Were the petitioner's rights as guaranteed to him under the Fourth Amendment violated by the search of the petitioner's premises without a search warrant and over his protest?

2. Did the government establish the *corpus delicti* by competent evidence?

3. Did the statements by the petitioner amount to a confession, without competent corroborative evidence?

4. Did the Circuit Court of Appeals err in affirming the judgment of the trial court?

Reasons for Allowance of Writ

1. The Circuit Court of Appeals held that the search of the smokehouse was incidental to the arrest, which is contrary to the decisions of the Supreme Court of the United States in the cases of *United States* v. *Lefkowitz,* 52 S. Ct. 420, 285 U. S. 452, and *Agnello* v. *United States,* 46 S. Ct. 4, 269 U. S. 20. In the said case of *United States* v. *Lefkowitz* it is held:

> "The only question presented is whether the searches of the desks, cabinet, and baskets and the seizures of the things taken from them were reasonable as an incident of the arrests. And that must be decided on the basis of valid arrests under the warrant. Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room

in order to ascertain whether the books, papers or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense against the Act. Their conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken.

"The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. Byars *v.* United States, 273 U. S. 28, 32, 47 S. Ct. 248, 71 L. Ed. 520. Its protection extends to offenders as well as to the law-abiding. Weeks *v.* United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. E. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Agnello *v.* United States, 269 U. S. 20, 32, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409. The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. United States *v.* Kirschenblatt (C. C. A.) 16 F. (2d) 202, 203, 51 A. L. R. 416; Go-Bart Co. *v.* United States, supra, 282 U. S. 358, 51 S. Ct. 153, 75 L. Ed. 374.

"Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely

describing such things and disclosing exactly where they were. Gouled *v.* United States, 255 U. S. 298, 310, 41 S. Ct. 261, 65 L. Ed. 647."

The court's attention is called to the fact that there was a valid warrant in the said *Lefkowitz* case and in the present case there was no warrant either for the petitioner's arrest or for the search of his premises.

In the said case of *Agnello* v. *United States* it is held:

"While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. Boyd *v.* United States, 116 U. S. 616, 624, et seq., 630, 6 S. Ct. 524, 29 L. Ed. 746; Weeks *v.* United States, supra, 393; Silverthorne Lumber Co. *v.* United States, supra, 391; Gouled *v.* United States, 255 U. S. 298, 308, 41 S. Ct. 261, 65 L. Ed. 647. The protection of the Fourth Amendment extends to all equally—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand special limitations have been set about the obtaining of search warrants for that purpose."

If the decision of the Circuit Court of Appeals should stand it would nullify the meaning of the Fourth Amendment—in that it would enable petty officers to go on the premises of the citizen and arrest him for some alleged infraction of the law and then conduct an exploratory search, and if any evidence were discovered use it against him. Congress never intended to pass any legislation which would give to petty officers such powers and had it passed such an act it would be unconstitutional because it would defeat the rights guaranteed to the citizen under the Fourth Amendment to the Constitution. The right to make an ar-

rest without a warrant and the right to search as incidental to an arrest must be strictly construed so as to prevent the encroachment by the officers on the rights of the citizen and to give full meaning to the Fourth Amendment.

2. The Circuit Court of Appeals decided that the government had properly established a *corpus delicti*. That this is in conflict with the decisions of the Circuit Court of Appeals of the District of Columbia in the case of *Forte* v. *United States*, 94 F. (2d) 236, and the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Hancey* v. *United States*, 108 F. (2d) 835.

In the *Forte* case the Court held:

> "It is to be noted, however, that in certain types of crimes involving scienter on the part of the accused it is not possible to separate, either conceptually or practically—that is in respect of the proof—the scienter, as an element of the corpus delicti, and the agency of the accused. So in the crime of receiving stolen goods knowing them to be stolen, and in the crime at bar, it is not possible to separate, either conceptually or practically, the element of guilty knowledge in the transportation and the element of agency of the accused as the criminal. But this cannot operate to diminish the duty of the Government to present evidence of both elements of the corpus delicti independent of the confession."

In the *Hancey* case the Court held:

> "In every criminal prosecution the burden rests upon the government to prove the corpus delicti—that is, that the crime charged has actually been committed and that the accused committed the crime. By corpus delicti is meant the body of the crime; that is, all the elements necessary to constitute the crime charged."

The petitioner contends that the Circuit Court of Appeals based its decision on the case of *United States* v. *Linden-*

feld, 2 Cir., 142 F. (2d) 829, 832, and that said *Lindenfeld* case is not in point because in that case the defendant had dispensed narcotics from his house, or office in his home. The officers on the outside furnished the marked money and arrested the defendant in the hall and he went with the officers into his office voluntarily and there they took from his records, or were given by him, certain cards which were later objected to. The facts in that case are not analogous to this present case because in this case the petitioner was arrested in or near the edge of his yard and, so far as the evidence disclosed, was never seen on the inside of his smokehouse. There being no question raised that this was not in the curtilage and entitled to the same protection as his home, and therefore, the petition should be allowed.

The petitioner contends that the Circuit Court of Appeals erred in sustaining the trial court's refusal to direct a verdict of not guilty at the close of all the evidence, because the intent to defraud the United States is of the very essence of the offense charged in the first three counts. *Partson* v. *United States*, 20 F. (2d) 127, 128.

The government was further required to prove that the petitioner was in fact carrying on the business of a distiller; that is, that he was the proprietor or owner and liable for the tax. *Anderson* v. *United States*, 30 F. (2d) 485, 487.

The petitioner further contends that the Circuit Court of Appeals committed error in sustaining the trial court in permitting the witness for the government to array before the jury his conclusions as facts.

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding the said Court to certify and send to this Court for its review and determination,

as provided by law, this cause and a complete transcript of the record and all proceedings had herein; to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgments herein of the Circuit Court of Appeals may be reversed and that petitioner may have such other and further relief in the premises as this Court may deem appropriate.

RICHARD SHEW,
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